



## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 5 CFR Part 3601

[Docket ID: DoD-2021-OS-0032]

RIN 0790-AL21

### Supplemental Standards of Ethical Conduct for Employees of the Department of Defense

**AGENCY:** Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** The DoD, with the concurrence of the U.S. Office of Government Ethics (OGE), is finalizing amendments to its Supplemental Standards of Ethical Conduct for Employees of the Department of Defense (DoD Supplemental Regulation). The amendments revise and update the DoD Supplemental Regulation originally written in 1993, to supplement the OGE Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards). Amendments include changes in the following areas: designation of separate agency components for the purposes of gifts and teaching, speaking, and writing; additional exceptions for gifts from outside sources; additional limitations on gifts between DoD employees; and authority to waive any of the provisions of the DoD Supplemental Regulation.

**DATES:** This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Karen Dalheim, Standards of Conduct Office, Office of the Secretary of Defense, Office of the General Counsel; telephone: 703-695-3422.

### SUPPLEMENTARY INFORMATION:

#### I. Background

Executive Order 12674, as amended by Executive Order 12731, authorized OGE to establish a single, comprehensive, and clear set of Executive Branch standards of conduct. On August 7, 1992, OGE published the Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards), as codified at 5 CFR part 2635. (*See* 57 FR 35006, as corrected at 57 FR 48557 and 57 FR 52583.) The OGE Standards, effective February 3, 1993, established uniform ethical conduct rules applicable to all officers and employees.

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive branch agencies to publish agency-specific supplemental regulations necessary and appropriate to implement their respective ethics programs. Pursuant to this authority, DoD, with OGE's concurrence and co-signature, published on September 10, 1993, a final rule to establish its supplemental standards of ethical conduct for DoD personnel (58 FR 47619, 58 FR 47622). DoD, with OGE's concurrence and joint issuance, amends the DoD Supplemental Regulation. An update to the DoD Supplemental Regulation is necessary to effectively administer DoD's ethics program and address changes to DoD's programs and operations which have ensued in the 29 years since the publication of the Supplemental Regulation in 1993 for the reasons explained below.

## **II. Explanation of Changes with this Rule**

The provision at 5 CFR 3601.102 currently designates components as separate agencies for the purposes of accepting gifts from non-Federal sources, and for outside teaching, speaking, and writing activities, two components have been added to the list, the National Reconnaissance Office (NRO), and DoD (Office of the Secretary of Defense (OSD) remainder agency). Although the concept of the OSD remainder agency is not novel, listing the OSD remainder agency and explaining that officers and employees of other DoD components not designated as separate agencies will be treated as officers and employees of the OSD remainder agency will clarify the application of the gift and teaching, speaking, and writing rules for these components.

The other amended sections relate to additional gift exceptions from outside sources and additional limitations on gifts between DoD employees. Finally, the addition of examples in the DoD Supplemental Regulation serves to illustrate the application of the rules.

DoD removes two sections from the 1993 DoD Supplemental Regulation, 5 CFR 3601.105, “Standards for accomplishing disqualifications”; and 5 CFR 3601.106, “Limitation on solicited sales.” Regarding the “[s]tandards for accomplishing disqualification,” DoD believes that following the OGE government-wide standard at 5 CFR part 2635, subpart D and §§ 2635.502, 2635.604, and 2635.606, which require oral notification of disqualification, sufficiently protect DoD interests without concurrently creating an administrative burden. Irrespective of whether a written disqualification is required, employees remain obligated to disqualify themselves from participating in matters affecting their financial interests, pursuant to 18 U.S.C. 208 and OGE’s implementing regulations at 5 CFR part 2635, subpart D. The elimination of the written disqualification requirement does not preclude employees from choosing to provide a written disqualification to a supervisor. The written disqualification will remain a best practice in internal guidance.

Regarding the “[l]imitation on solicited sales,” this section is not a supplementation of the OGE Standards, 5 CFR part 2635, and is, therefore, being removed consistent with the guidance in OGE Legal Advisory, LA-11-07 (2011), <https://www2.oge.gov/web/oge.nsf/Resources/LA-11-07:+The+OGE+Supplemental+Agency+Regulation+Process>. The subject matter of this section falls outside of OGE’s authority and, therefore, cannot be included in the DoD Supplemental Regulation. The requirement, however, remains in effect in internal DoD issuances.

Updates to 5 CFR 3601.106 (formerly § 3601.107) take into consideration advances in technology related to financial disclosure reporting and remove the requirement that the prior approval be written. The original DoD Supplemental Regulation, requiring written prior

approval of business activities or compensated outside employment with a prohibited source, was deemed necessary in an era when paper documentation was the norm.

Beginning in 2016, DoD mandated the electronic filing of all financial disclosure reports, with a built-in mandatory supervisory review function. Financial disclosure forms are filed annually and supervisors are required, as a part of their review, to determine if an employee's business activity or outside employment conflicts with the employee's official duties. Prior to certifying a filer's report, the supervisor will be required by departmental guidance to annotate their approval of the filer's business activity or outside employment on the report.

This electronic filing system is easily accessible and follows employees in DoD's mobile workforce. Using the electronic filing system ensures supervisors will have access to an employee's prior financial disclosure reports and consequently, information on their business activity and outside employment.

Finally, DoD adds one new section entitled "[w]aiver" that allows the DoD General Counsel to waive any provision of the DoD Supplemental Regulation upon finding that doing so would not be inconsistent with 5 CFR part 2635 and is not otherwise prohibited by law. This provision also allows the DoD General Counsel to withdraw a waiver when it is no longer necessary.

The amendments also incorporate a number of changes that are technical in nature, (e.g., updating agency names and addressing typographical errors that do not affect the substance of the DoD Supplemental Regulation).

### **III. Section by Section Discussion**

The following is a section-by-section overview of the amendments in this rulemaking.

Section 3601.102 -- Designation of DoD components as separate agencies for purposes of gifts, and teaching, speaking, and writing. Section 3601.102 is amended to update the list of components, designated as separate agencies for the purpose of accepting gifts from non-Federal sources and outside teaching, speaking, and writing activities. DoD previously

designated 16 DoD components as separate agencies and the remainder of the DoD components as a separate single agency, the OSD remainder agency. The amendment designates two additional separate agencies, the NRO, consistent with NRO's designation as a separate component in appendix B to 5 CFR part 2641 and DoD OSD. For these purposes, use of the term "agency" does not carry the responsibilities of a "defense agency" as set forth in 10 U.S.C. 191-197 (2019). The amendment also updates the name of the Defense Security Service, which was renamed the Defense Counterintelligence and Security Agency in 2019. To further illustrate the components concept, examples were added. DoD also included clarifying discussion about the OSD remainder agency for post-government employment restrictions.

Section 3601.103 -- Additional exceptions for gifts from outside sources. Section 3601.103 clarifies and amends the current DoD Supplemental Regulation that provides an additional exception to the gift prohibition in 5 CFR 2635.202(a). Specifically, § 3601.103(a) highlights that officers and employees may accept an unsolicited gift of free attendance at certain events sponsored by a State or local government or by certain civic organizations when their personal attendance has been determined to serve a community relations interest of their agency. The § 3601.103(a) exception amendment is intended to clarify and emphasize the continuing community relations interest DoD has in the communities where DoD activities operate. The addition of examples further illustrates these concepts. The amendment also requires that the community relations interest outweigh any concern that acceptance would cause a reasonable person with knowledge of the relevant facts to question the employee's integrity or impartiality. This new step in the gift acceptance analysis models OGE's framework for considering otherwise permissible gifts in 5 CFR 2635.201(b). Finally, the § 3601.103(a) exception amendment permits attendance by an employee's guest, not just his or her spouse. This change creates consistency between DoD's Supplemental Regulation and OGE's 2016 revision of 5 CFR part 2635, subpart B, which uses the phrase "spouse or other guest" in the context of gifts. Section 3601.103(b) reassigns approval authority for acceptance of

educational scholarships or grants from the Secretary of Defense, or Secretary of the Military Department concerned, to the Designated Agency Ethics Official (DAEO) or the DAEO's designee. Experience indicates that the DAEO, as opposed to the Secretary of Defense or the Secretary of a Military Department, is in a better position to evaluate and review the acceptance of educational scholarships or gifts by employees or dependents of employees. The amendment also more closely tracks the standard for an "established program of recognition" in 5 CFR 2635.204(d)(2) and requires the DAEO or the DAEO's designee to make the determination in writing. The updates are consistent with the process for reviewing awards accepted using 5 CFR 2635.204(d), which requires an agency ethics official to review the acceptance of certain gifts. Establishing the approval authority at the DAEO or designee level fully protects DoD interests and ensures that the reviews are done in a timely manner.

Section 3601.104 -- Additional limitations on gifts between employees. Section 3601.104(a) modifies the current \$300 limit on gifts from a group that includes an employee's subordinate. This limit has not been increased since the implementation of the DoD Supplemental Regulation in September 1993. The new rulemaking uses the "minimal value" threshold established in the Foreign Gifts and Decorations Act, 5 U.S.C. 7342(a)(5) (2019), which is adjusted every three years by the General Services Administration.

Section 3601.105 -- Disclaimer for teaching, speaking, and writing in a personal capacity related to official duties. Section 3601.105 is renumbered from the existing regulation because of the deletion of § 3601.105 (Standards of accomplishing disqualification), § 3601.106 (Limitation on solicited sales), and § 3601.107 (Prior approval for outside employment and business activities). Additionally, § 3601.105 makes minor non-substantive changes and includes examples to further illustrate application of the regulation.

Section 3601.106 -- Prior approval for outside employment and business activities. Section 3601.106 is renumbered from the existing regulation because of the deletion of previous chapters as described above. Section 3601.106 removes the requirement for written prior

approval that certain employees must receive to engage in outside employment or business activities. The requirement for prior approval is retained and will be documented annually in the applicable electronic financial disclosure filing system. Additionally, two non-substantive changes were made to correctly identify OGE documents.

Section 3601.107 -- Waiver. Section 3601.107 authorizes the DoD General Counsel (DoD Designated Agency Ethics Official) to waive any provision of this part, provided that a waiver is not inconsistent with 5 CFR part 2635 or otherwise prohibited by law, and issuance of the waiver will not undermine public confidence. This section also contains guidance pertaining to the contents of the waiver. The DoD General Counsel may withdraw the waiver if he or she determines that it is no longer necessary.

#### **IV. Matters of Regulatory Procedure**

##### **Administrative Procedure Act**

Pursuant to 5 U.S.C. 553(a)(2), DoD was not required to provide a general notice of proposed rulemaking, opportunity for advance comment, and a 30-day delay in effectiveness because the proposed rule was a matter relating to Federal personnel. This rulemaking contains statements of policy, interpretive rules, and conduct regulations related to DoD personnel. However, because this rulemaking may be improved, it was published in the Federal Register on June 10, 2022 (87 FR 35460-35465). DoD received one set of timely and responsive comments, which were submitted by an individual.

The first comment suggested mandatory involvement from public affairs to assist in determining whether the community relations interest of the agency will be served by DoD employee attendance. DOD believes, the agency designee has sufficient knowledge to make the determination that attendance by agency personnel at a community event sponsored by a State or local government, or by a civic organization exempt from taxation under 26 U.S.C. 501(c)(4) will serve an agency interest. While a designees are encouraged to consult with their public affairs officer, DoD believes making consultation mandatory is not necessary.

The second comment suggested the \$300 limit on gifts from groups of subordinates to superiors on special infrequent occasions be amended and capped at \$415, rather than linked to the Foreign Gifts and Decorations Act. In consultation with the OGE, DoD determined that modifying the current \$300 limit on gifts from a group that includes an employee's subordinate is not likely to lead to inappropriate gifts to superiors. Increasing the limit, which was established in 1993 and has not been updated since, appropriately accounts for inflation that has occurred over the last 29 years. Setting a limit that is consistent with the "minimal value" threshold established in the Foreign Gifts and Decorations Act tracks language in the Ethics in Government Act (5 U.S.C. app. 102(a)(2)(A) and (B)). This language ties the gift reporting threshold for purposes of financial disclosure reporting to that in the Foreign Gifts and Decorations Act.

The third comment suggested the requirement for prior written approval of outside employment and business activity remain in the rule. As stated in proposed rule 5 CFR 3601.106(a), "[n]othing in this regulation precludes a supervisor from providing the employee with written approval." Furthermore, the requirement for prior approval is retained and documented annually in the applicable electronic financial disclosure, which is reviewed by the supervisor and follows employees in DoD's mobile workforce.

After carefully considering the set of comments DoD is publishing this final rule with no changes

### **Congressional Review**

This rulemaking relates to agency personnel and does not substantially affect the rights or obligations of non-agency parties. Therefore, it does not meet the definition of a "rule" at 5 U.S.C 804 and is not subject to the procedures of the Congressional Review Act.

**Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"**

These Executive orders direct agencies to assess all costs, benefits, and available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, safety effects, distributive impacts, and equity). These Executive orders emphasize the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking is not a “significant regulatory action” under section 3(f) of Executive Order 12866, “Regulatory Planning and Review,” as supplemented by Executive Order 13563, “Improving Regulation and Regulatory Review.” Accordingly, the Office of Management and Budget has not reviewed this rulemaking.

#### **Executive Order 12988, “Civil Justice Reform”**

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

#### **Paperwork Reduction Act**

The amended regulations contain no additional information-collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq.

#### **Regulatory Flexibility Act (RFA)**

As required by the RFA, DoD certifies this regulation will not have a significant economic impact on a substantial number of small entities.

#### **List of Subjects in 5 CFR Part 3601**

Conflict of interests, Executive branch standards of conduct, Government employees.  
For the reasons discussed in the preamble, DoD revises 5 CFR part 3601 to read as follows:

#### **PART 3601—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF DEFENSE**

Sec.

3601.101 Purpose.

3601.102 Designation of DoD components as separate agencies for purposes of gifts from outside sources, and teaching, speaking, and writing.

- 3601.103 Additional exceptions for gifts from outside sources.
- 3601.104 Additional limitations on gifts between employees.
- 3601.105 Disclaimer for teaching, speaking, and writing in a personal capacity related to official duties.
- 3601.106 Prior approval for outside employment and business activities.
- 3601.107 Waiver.

Authority: 5 U.S.C. 301, 7301, 7351, 7353; 5 U.S.C. Chapter 131; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.203(a), 2635.204(k), 2635.803, 2635.807.

#### **§ 3601.101 Purpose.**

In accordance with 5 CFR 2635.105, the regulations in this part apply to employees of the Department of Defense (DoD) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. DoD employees are required to comply with part 2635, this part, and implementing guidance and procedures.

#### **§ 3601.102 Designation of DoD components as separate agencies for purposes of gifts from outside sources, and teaching, speaking, and writing.**

(a) Pursuant to 5 CFR 2635.203(a), each of the following DoD components is designated as a separate agency for purposes of the regulations in subpart B of 5 CFR part 2635 governing gifts from outside sources and 5 CFR 2635.807 governing teaching, speaking, and writing:

- (1) Armed Services Board of Contract Appeals;
- (2) Department of the Army;
- (3) Department of the Navy;
- (4) Department of the Air Force;
- (5) Defense Commissary Agency;
- (6) Defense Contract Audit Agency;
- (7) Defense Finance and Accounting Service;
- (8) Defense Information Systems Agency;
- (9) Defense Intelligence Agency;
- (10) Defense Logistics Agency;

- (11) Defense Counterintelligence and Security Agency;
- (12) Defense Threat Reduction Agency;
- (13) National Geospatial-Intelligence Agency;
- (14) National Security Agency;
- (15) Office of Inspector General;
- (16) Uniformed Services University of the Health Sciences;
- (17) National Reconnaissance Office; and
- (18) Office of the Secretary of Defense remainder agency.

*Example 1 to paragraph (a).* For paragraph (a)(1) of this section [Teaching, Speaking, or Writing]: An Armed Services Board of Contract Appeals (ASBCA) employee is asked to give a compensated speech on prisoners of war, a topic on which he has a personal interest. While the Department of Defense has ongoing policies, programs, or operations related to this topic, the ASBCA does not. The employee may give the speech in a personal capacity and receive compensation because the ASBCA is a designated separate agency, the speech is not related to an ongoing program or operation of the ASBCA, and the speech is not otherwise related to the employee's official duties.

*Example 2 to paragraph (a).* For paragraphs (a)(2) and (18) of this section [Separate component - gift]: An employee of the Department of the Army (Army) and an employee of the Office of the Joint Chiefs of Staff (JCS) are each offered a ticket to a football game by a company that contracts with OSD. As long as the contractor is not a prohibited source for the Army and the gift is not offered because of the employee's official position, the Army employee may accept the ticket because the Army is designated as a separate agency under paragraph (a)(2). The JCS employee may not accept the ticket because JCS is not designated as a separate agency and, therefore, is part of the "OSD remainder agency." The OSD contractor is therefore a prohibited source for the JCS employee or for any employee of any of the other organizations that are part of the OSD remainder agency.

*Example 3 to paragraph (a).* For paragraph (a)(11) of this section [Agency designation]: An employee of the Department of the Air Force is offered a gift by a company that only does business with the Defense Counterintelligence and Security Agency, which is designated as a separate agency. The company would be a prohibited source of gifts for employees of the Defense Counterintelligence and Security Agency but not for employees of the Department of the Air Force or for any other component which has been designated as a separate agency.

(b) Employees of DoD components not designated as separate agencies, including employees of the Office of the Secretary of Defense, will be treated as employees of the “Office of the Secretary of Defense (OSD) remainder agency.” The OSD remainder agency shall itself be treated as a separate DoD agency for purposes of determining whether the donor of a gift is a prohibited source under 5 CFR 2635.203(d) and for identifying the employee’s agency under 5 CFR 2635.807 governing teaching, speaking, and writing.

(1) The use of the term “agency” in this part does not carry with it the designation and responsibilities of a “defense agency” as set forth in 10 U.S.C. 191-197 (2019).

(2) For purposes of this part, “prohibited source” is defined at 5 CFR 2635.203(d), except that “agency” shall mean the employee’s component.

*Note 1 to paragraph (b).* All DoD organizations not individually listed in paragraph (a) of this section are part of the OSD remainder agency.

*Note 2 to paragraph (b):* Prohibited sources for each component for purposes of gifts and teaching, speaking, and writing are exclusive to that component and are not imputed to OSD.

*Note 3 to paragraph (b).* An employee who is detailed to another component will use the prohibited source list of the component to which they are detailed for purposes of gifts, teaching, speaking, and writing.

(c) The designations in this section shall only apply for purposes of gifts under 5 CFR 2635.203(a) and teaching, speaking, and writing under 5 CFR 2635.807, and are distinct from the designations approved by the Office of Government Ethics for purposes of the post-

Government employment restrictions in 18 U.S.C. 207(c). See 5 CFR 2641.302 and appendix B to part 2641.

**§ 3601.103 Additional exceptions for gifts from outside sources.**

In addition to the gift exceptions in 5 CFR 2635.204, which authorize acceptance of certain gifts from outside sources, and subject to all provisions of 5 CFR part 2635, subpart B, an employee may accept unsolicited gifts from outside sources otherwise prohibited by 5 CFR 2635.202 as detailed in this section. For purposes of this section, the term “agency” is defined in § 3601.102, and the term “free attendance” is defined in 5 CFR 2635.203(g).

(a) *Community relations events.* (1) An employee may accept an unsolicited gift of free attendance for himself or herself and a guest at a community relations event sponsored by a State or local government, or by a civic organization exempt from taxation under 26 U.S.C. 501(c)(4), when:

(i) The cost of free attendance is provided by the sponsor of the event; and

(ii) The employee’s agency designee determines that the community relations interests of the agency will be served by the employee’s attendance in his or her personal capacity, and the employee’s attendance outweighs any concern that acceptance would cause a reasonable person with knowledge of the relevant facts to question the employee’s integrity or impartiality.

(2) Refer to 5 CFR 2635.204(g)(5) in determining whether the cost of attendance may be considered to be provided by the sponsor of the event.

*Example 1 to paragraph (a)* [Community relations interest]: The City of Jacksonville, Florida, hosts a Military Appreciation Day event. Members of the general public are charged an admission fee to attend. Department of the Navy employees who have recently returned from deployment are invited and offered free admission for themselves and a guest. These Navy employees may personally accept the gift of free attendance for themselves and a guest, if their agency designee determines that their attendance at the event will serve a community relations interest and that employees’ attendance outweighs concerns that acceptance would call into

question their integrity or impartiality.

*Example 2 to paragraph (a)* [No community relations interest]: A foundation that provides grants to non-profit organizations focusing on environmental initiatives is sponsoring a fundraising golf tournament. The foundation is offering to waive the entry fee for military personnel at the local installation. Military personnel may not accept the offer by the sponsor to waive the entry fee under paragraph (a) of this section, because participation in this event does not further local community relations interests for the DoD installation. While the community relations exception may not be used to accept the gift, nothing in this section precludes an employee from accepting the gift if another gift exclusion, exception, or authority would apply.

(b) *Scholarships and grants.* An employee and his or her dependents may accept an educational scholarship or grant from an entity that does not have interests that may be substantially affected by the performance or non-performance of the employee's official duties, or from an association or similar entity that does not have a majority of members with such interests, if the Designated Agency Ethics Official (DAEO) or the DAEO's designee makes a written determination that the scholarship or grant is made pursuant to an established program of recognition, including those established for the benefit of employees, or the dependents of employees. A scholarship or grant is made pursuant to an established program of recognition if:

(1) Scholarships or grants have been made on a regular basis or, if the program is new, there is a reasonable basis for concluding that scholarships or grants will be made on a regular basis based on funding or funding commitments; and

(2) Selection of recipients is made pursuant to written standards.

#### **§ 3601.104 Additional limitations on gifts between employees.**

The following limitations apply to gifts from groups of employees that include a subordinate and to voluntary contributions to gifts for superiors permitted under 5 CFR 2635.304(c)(1):

(a) *Gifts from a group that includes a subordinate.* Regardless of the number of

employees contributing to a gift on a special, infrequent occasion as permitted by 5 CFR 2635.304(c)(1), an employee may not accept a gift or gifts, including indirectly within the meaning of 5 CFR 2635.203(f), from a donating group if the aggregate market value exceeds the minimal value, as established by 5 U.S.C. 7342(a)(5), and if the employee knows or has reason to know that any member of the donating group is a subordinate.

(1) The cost of items excluded from the definition of a gift by 5 CFR 2635.203(b) and the cost of food, refreshments, and entertainment provided to mark the occasion for which the gift is given shall not be included in determining whether the value of a gift or gifts exceeds the aggregate minimal value limit.

(2) The value of a gift or gifts from two or more donating groups will be aggregated and will be considered to be from a single donating group if the employee who is offered the gift knows or has reason to know that an individual who is his or her subordinate is a member of more than one of the donating groups.

(b) *Voluntary contribution.* For purposes of 5 CFR 2635.304(c)(1), the nominal amount of a voluntary contribution that an employee may solicit from another employee for a group gift to the contributory employee's superior for any special, infrequent occasion will not exceed \$10. A voluntary contribution of a nominal amount for food, refreshments, and entertainment at an event to mark the occasion for which a group gift is given may be solicited as a separate, voluntary contribution not subject to the \$10 limit.

**§ 3601.105 Disclaimer for teaching, speaking, and writing in a personal capacity related to official duties.**

An employee who uses or permits the use of his or her military rank or who includes or permits the inclusion of his or her title or position as one of several biographical details given to identify himself or herself in connection with teaching, speaking, or writing, in accordance with 5 CFR 2635.807(b), must make a disclaimer if the subject of the teaching, speaking, or writing deals in significant part with any ongoing or announced policy, program, or operation of the

employee's agency, as defined in § 3601.102, and the employee has not been authorized by appropriate agency authority to present that material as the agency's position. The disclaimer must be made as follows:

(a) The required disclaimer must expressly state that the views presented are those of the speaker or author and do not necessarily represent the views of DoD or its components.

(b) When a disclaimer is required for an article, book, or other writing, the disclaimer will be printed in a reasonably prominent position in the writing itself.

(c) When a disclaimer is required for a speech or other oral presentation, the disclaimer may be given orally provided it is given at the beginning of the oral presentation.

*Example 1 to § 3601.105 [Disclaimer Required]:* An employee is asked to provide unpaid personal remarks at a local university on a DoD matter she handled in the past year. As part of her introduction, the university facilitator identifies the employee by her official title. Since the subject matter of her speech is related to her official duties, and her official title is used, she must provide a reasonably prominent disclaimer at the beginning of her remarks.

*Example 2 to § 3601.105 [Disclaimer Not Required]:* An employee is invited in his personal capacity to speak at his alma mater on Career Day about his personal experiences as a Government employee, but will not discuss the ongoing or announced policy, program, or operation of his agency. The introduction to his talk only mentions that he is a graduate of the school and currently a "DoD employee," but does not use his official title, rank, or position. No disclaimer would be necessary because the introduction to the employee's speech did not include his official title or position and the subject of the speech does not deal in significant part with any ongoing or announced policy, program or operation of the relevant DoD agency.

*Note 1 to § 3601.105.* Ethics review of whether a disclaimer is necessary or prudent is not a substitute for compliance with other DoD requirements such as obtaining a security review of the content of the teaching, speaking, or writing.

#### **§ 3601.106 Prior approval for outside employment and business activities.**

(a) A DoD employee, other than a special Government employee who is required to file a financial disclosure report (OGE Forms 450 or 278e), shall obtain approval from the agency designee before engaging in a business activity or compensated outside employment with a prohibited source, unless general approval has been given in accordance with paragraph (b) of this section. Approval shall be granted unless a determination is made that the business activity or compensated outside employment is expected to involve conduct prohibited by statute or regulation. Approval of the DoD employee's business activity or compensated outside employment with a prohibited source will be annotated on the employee's annual financial disclosure report. Nothing in this part precludes a supervisor from providing the employee with written approval. For purposes of this section, the following definitions apply:

(1) *Business activity.* Any business, contractual, or other financial relationship not involving the provision of personal services by the DoD employee. It does not include a routine commercial transaction or the purchase of an asset or interest, such as common stock, that is available to the general public.

(2) *Employment.* Any form of non-Federal employment or business relationship involving the provision of personal services by the DoD employee. It includes, but is not limited to, personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, or trustee.

(3) *Prohibited source.* See 5 CFR 2635.203(d) (modified by the separate DoD component agency designations in § 3601.102).

(b) The DoD component DAEO or designee may, by a written notice, exempt categories of business activities or employment from the requirement of paragraph (a) of this section based on a determination that business activities or employment within those categories would generally be approved and are not likely to involve conduct prohibited by statute or regulation.

#### **§ 3601.107 Waiver.**

(a) The DoD General Counsel may waive any provision of this part based upon a

determination that the waiver is not inconsistent with 5 CFR part 2635 or otherwise prohibited by law, and that waiver of the provision will not undermine public confidence in the integrity of Government programs or operations. The waiver must be:

- (1) In writing;
- (2) Supported by a detailed statement of facts and findings; and
- (3) Narrow in scope and limited in duration.

(b) The DoD General Counsel may withdraw the waiver, in writing, if it is determined to no longer be necessary.

(c) The authority for granting and withdrawing a waiver cannot be delegated below the DoD Alternate DAEO.

**Caroline Krass,**

*General Counsel,  
U.S. Department of Defense.*

**Emory Rounds,**

*Director,  
U.S. Office of Government Ethics.*